

STATE OF MICHIGAN
COURT OF APPEALS

THELMA JOHNSON, Personal Representative of
the Estate of CARL JOHNSON, Deceased,

Plaintiff-Appellant,

v

HURLEY MEDICAL GROUP, P.C., d/b/a
HURLEY MEDICAL CENTER, and DR.
MOONGILMADUGU INBA-VAZHVU,

Defendants-Appellees,

and

KENNETH JORDAN, M.D.,

Defendant.

FOR PUBLICATION
April 13, 2006
9:05 a.m.

No. 262143
Genesee Circuit Court
LC No. 00-069254-NH

Official Reported Version

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

In this wrongful death, medical malpractice action, plaintiff appeals as of right a circuit court order granting summary disposition for defendants Hurley Medical Group, P.C., doing business as Hurley Medical Center; and Dr. Moongilmadugu Inba-Vazhvu. The circuit court found plaintiff's complaint time-barred and granted summary disposition under MCR 2.116(C)(7). We reverse.

I

Plaintiff's decedent, Carl Johnson, went to Hurley Medical Center's emergency room in Flint at approximately 2:40 p.m. on November 22, 1997, and related complaints of chest pain that extended to his arms during the previous four to five months, as well as shortness of breath. Johnson's medical history included high cholesterol, hypertension, and smoking. The medical center admitted Johnson, and Dr. Kenneth Jordan and other doctors treated Johnson until they discharged him shortly before 3:00 p.m. on November 23, 1997. According to the complaint, Johnson received "instructions to continue Zestril, Dyazid and . . . Fenoprophren and to maintain a low salt, low cholesterol and low sugar diet." Johnson also was advised to visit his primary physician, Dr. Jordan, within the next week and to see Dr. Inba-Vazhvu for a stress test.

Plaintiff's complaint alleges that on November 26, 1997, Dr. Inba-Vazhvu examined Johnson and scheduled a stress test for the next week, but "did not perform . . . any other diagnostic tests to evaluate and/or determine the cause/source of [Johnson's] chest pain. Further, Dr. Inba-Vashvu [sic] did not administer appropriate medical therapy to prevent myocardial infarction" and did not order "restrictions on [Johnson's] activities" In the evening of November 26, 1997, Johnson died from a massive heart attack. After receiving letters of authority appointing her as personal representative of Johnson's estate on July 31, 1998, plaintiff, Johnson's widow, gave defendants notice of her intent to pursue medical malpractice claims on July 17, 2000, and filed this medical malpractice action on December 22, 2000.

Dr. Inba-Vazhvu moved for summary disposition pursuant to MCR 2.116(C)(7) (period of limitations) and (10), arguing that plaintiff failed to commence the action within the two-year medical malpractice period of limitations, which expired by November 26, 1999, the second anniversary of the decedent's death, and, although plaintiff gave defendants notice of her intent to commence a medical malpractice action as required by MCL 600.2912b on July 17, 2000, within two years of her appointment as personal representative, the Supreme Court in *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004), held that the filing of a medical malpractice notice does not operate to toll the wrongful death saving period under MCL 600.5856(d). Further, this Court's decision in *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), applied *Waltz* retroactively. Hurley Medical Center concurred in Dr. Inba-Vazhvu's motion.¹

Plaintiff sought to distinguish *Waltz* and *Ousley* on the basis that the plaintiffs in those cases had failed to bring the action within the three-year ceiling of the wrongful death saving period, MCL 600.5852, whereas plaintiff had brought this action within that period. The circuit court granted the motion for summary disposition pursuant to MCR 2.116(C)(7), and plaintiff reasserts her arguments on appeal.

II

Whether a period of limitations applies in particular circumstances and whether the doctrine of equitable or judicial tolling should apply given the facts of this case constitute legal questions that this Court considers de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 418-419, 432-433; 684 NW2d 864 (2004); *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003).

We first observe that a panel of this Court has rejected the distinction plaintiff seeks to draw between the *Waltz* and *Ousley* cases and this case, which distinction is based on the distinction between the two-year and three-year provisions of the saving statute. In *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 574-575; 703 NW2d 115 (2005), the Court stated:

¹ In September 2002, pursuant to the parties' stipulation, the circuit court dismissed Dr. Kenneth Jordan from the action.

Farley argues that neither *Waltz* nor *Ousley* addressed whether a suit is timely when, as here, the personal representative filed suit within three years after the two-year medical malpractice limitations period (MCL 600.5805) had expired, and therefore those cases do not determine the outcome here. It is true that, in *Waltz* and *Ousley*, the personal representative filed suit after both the two-year malpractice limitations period (MCL 600.5805) and the three-year ceiling set forth in the wrongful death saving provision (MCL 600.5852) had passed. However, this factual distinction makes no difference. As noted, the three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit: it is only a limitation on the two-year saving provision itself.^[2]

Thus, plaintiff's effort to distinguish *Waltz* on this basis must fail.

III

Plaintiff asserts that the Supreme Court's holding in *Waltz*, decided on April 14, 2004, has no applicability to this case because the relevant procedural events occurred before the issuance of the *Waltz* decision. In *Ousley*, *supra* at 486, this Court rejected the plaintiff's argument that *Waltz* should be applied only prospectively. However, in *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586, 591; ___ NW2d ___ (2006), a panel of this Court declared a conflict with *Ousley* pursuant to MCR 7.215(J), and this Court subsequently convened a special panel to resolve the conflict. The outcome of that case will determine this issue.³

IV

Plaintiff also argues that if defendants' and *Farley's* interpretations of *Waltz* are correct, equity demands the application of judicial tolling because plaintiff was required to file the notice of intent under MCL 600. 2912 and she relied on *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), clarified and overruled in part in *Waltz*, *supra* at 652-655, in filing her claim

² The *Farley* Court also stated:

We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [*Farley*, *supra* at 573 n 16 (emphasis in original).]

³ We do not reverse on the basis of the rule set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002), as suggested by Judge O'Connell in his concurring opinion, because this is the precise issue to be determined by the conflict panel.

when she did. In *Mazumder v Univ of Michigan Bd of Regents*, 270 Mich App 42; ___ NW2d ___ (2006), a panel of this Court agreed that, separate and apart from the pure retroactivity question decided in *Ousley*, the doctrine of equitable or judicial tolling applies in situations such as that involved here. Because this issue is dispositive regardless of the decision of the conflict panel, we reverse and remand for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Helene N. White